

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DWAYNE MONTGOMERY,

Plaintiff,

v.

SAM WONG, et al.,

Defendants.

No. 2:20-cv-1515 DB P

ORDER

Plaintiff is a state prisoner proceeding pro se in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983 and has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

Plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). Accordingly, the request to proceed in forma pauperis will be granted.

Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C. §§ 1914(a), 1915(b)(1). By this order, plaintiff will be assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. § 1915(b)(1). By separate order, the court will direct the appropriate agency to collect the initial partial filing fee from plaintiff's trust account and forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated for monthly payments of twenty percent of the preceding month's income credited to plaintiff's prison trust account.

1 These payments will be forwarded by the appropriate agency to the Clerk of the Court each time  
 2 the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C.  
 3 § 1915(b)(2).

#### 4 **I. Screening Requirement**

5 The in forma pauperis statute provides, "Notwithstanding any filing fee, or any portion  
 6 thereof, that may have been paid, the court shall dismiss the case at any time if the court  
 7 determines that . . . the action or appeal . . . fails to state a claim upon which relief may be  
 8 granted." 28 U.S.C. § 1915(e)(2)(B)(ii).

#### 9 **II. Pleading Standard**

10 Section 1983 "provides a cause of action for the deprivation of any rights, privileges, or  
 11 immunities secured by the Constitution and laws of the United States." Wilder v. Virginia Hosp.  
 12 Ass'n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983). Section 1983 is not itself a source of  
 13 substantive rights, but merely provides a method for vindicating federal rights conferred  
 14 elsewhere. Graham v. Connor, 490 U.S. 386, 393-94 (1989).

15 To state a claim under § 1983, a plaintiff must allege two essential elements: (1) that a  
 16 right secured by the Constitution or laws of the United States was violated and (2) that the alleged  
 17 violation was committed by a person acting under the color of state law. See West v. Atkins, 487  
 18 U.S. 42, 48 (1988); Ketchum v. Alameda Cnty., 811 F.2d 1243, 1245 (9th Cir. 1987).

19 A complaint must contain "a short and plain statement of the claim showing that the  
 20 pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not  
 21 required, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere  
 22 conclusory statements, do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell  
 23 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Plaintiff must set forth "sufficient factual  
 24 matter, accepted as true, to state a claim to relief that is plausible on its face." Id. Facial  
 25 plausibility demands more than the mere possibility that a defendant committed misconduct and,  
 26 while factual allegations are accepted as true, legal conclusions are not. Id. at 677-78.

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**III. Plaintiff's Allegations**

Plaintiff brings an Eighth Amendment claim for conduct occurring while he was a state inmate housed at Mule Creek State Prison in Ione, California. He names as defendants Dr. Sam Wong, Dr. C. Smith, and Chief of Health Care Correspondence and Appeals Branch Policy and Risk Management Services S. Gates. Plaintiff seeks injunctive relief and damages.

Plaintiff's allegations may be fairly summarized as follows:

Plaintiff suffers from a progressive condition called v-fiscula maleformation (deformity) to his right foot. In 2006 and 2008, plaintiff had two surgeries at the UCSF Medical Center, where the doctors determined that plaintiff suffers from permanent neurological damage that can only be managed by pain medication. Plaintiff also suffers from chronic back pain, having been diagnosed with severe arthritis in the lower back.

As a result of these medical conditions, plaintiff is unable to lift more than 25 pounds or stand for long periods of time without experiencing pain. He requires the use of a back brace and a walking apparatus.

A lieutenant had assigned plaintiff to the kitchen where he was required to stand for 4-6 hours five days a week washing heavy pots and pans and lifting trash bags full weighing up to 70 pounds. When plaintiff was not able to report to work due to his immobility, he was issued a Rules Violation Report and threatened with progressive disciplinary reprisals if he continued to refuse to report to work without a medical chrono.

In August 2019, plaintiff's pain medication was discontinued "for no substantial reason," and no substitute medication was prescribed. Dr. Wong claimed that he tried to get the pain medication reissued, but Dr. Smith declined to approve it because plaintiff was already taking a medication called Triloptal. Plaintiff claims that Triloptal was prescribed by his psychiatrist as a mood stabilizer and is not pain medication.

In 2018, plaintiff began to request a replacement back brace because his previously-prescribed back brace was old and no longer functioning properly. Dr. Wong also tried to get a replacement back brace, but Dr. Smith refused this request.

1 When plaintiff appealed both of these decisions, defendant Gates denied the appeal at the  
2 final level of review, noting in his response that plaintiff was “being evaluated for a back brace  
3 accommodation,” but plaintiff claims he has not yet received the back brace.

#### 4 **IV. Discussion**

##### 5 **A. Eighth Amendment Medical Indifference**

6 Where a prisoner’s Eighth Amendment claims arise in the context of medical care, the  
7 prisoner must allege and prove “acts or omissions sufficiently harmful to evidence deliberate  
8 indifference to serious medical needs.” Estelle v. Gamble, 429 U.S. 97, 106 (1976). An Eighth  
9 Amendment medical claim has two elements: “the seriousness of the prisoner’s medical need and  
10 the nature of the defendant’s response to that need.” McGuckin v. Smith, 974 F.2d 1050, 1059  
11 (9th Cir. 1991), overruled on other grounds by WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th  
12 Cir. 1997) (en banc).

13 A serious medical need exists if the failure to treat the condition could result in further  
14 significant injury or the unnecessary and wanton infliction of pain. Jett v. Penner, 439 F.3d 1091,  
15 1096 (9th Cir. 2006). To act with deliberate indifference, a prison official must both be aware of  
16 facts from which the inference could be drawn that a substantial risk of serious harm exists, and  
17 he must also draw the inference. Farmer v. Brennan, 511 U.S. 825, 837 (1994). Thus, a defendant  
18 is liable if he knows that plaintiff faces “a substantial risk of serious harm and disregards that risk  
19 by failing to take reasonable measures to abate it.” Id. at 847. “It is enough that the official acted  
20 or failed to act despite his knowledge of a substantial risk of harm.” Id. at 842.

21 In applying this standard, the Ninth Circuit has held that before it can be said that a  
22 prisoner’s civil rights have been abridged, “the indifference to his medical needs must be  
23 substantial. Mere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this cause  
24 of action.” Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980) (citing Estelle,  
25 429 U.S. at 105–06). “[A] complaint that a physician has been negligent in diagnosing or treating  
26 a medical condition does not state a valid claim of medical mistreatment under the Eighth  
27 Amendment. Medical malpractice does not become a constitutional violation merely because the  
28 victim is a prisoner.” Estelle, 429 U.S. at 106; see also Anderson v. County of Kern, 45 F.3d

1 1310, 1316 (9th Cir. 1995). Even gross negligence is insufficient to establish deliberate  
2 indifference to serious medical needs. See Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir.  
3 1990). Additionally, a prisoner's mere disagreement with diagnosis or treatment does not support  
4 a claim of deliberate indifference. Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989).

5 Delays in providing medical care may manifest deliberate indifference. Estelle, 429 U.S.  
6 at 104-05. To establish a claim of deliberate indifference arising from a delay in providing care, a  
7 plaintiff must show that the delay was harmful. See Berry v. Bunnell, 39 F.3d 1056, 1057 (9th  
8 Cir. 1994); McGuckin, 974 F.2d at 1059; Wood v. Housewright, 900 F.2d 1332, 1335 (9th Cir.  
9 1990); Shapley v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404, 407 (9th Cir. 1985). In this  
10 regard, "[a] prisoner need not show his harm was substantial; however, such would provide  
11 additional support for the inmate's claim that the defendant was deliberately indifferent to his  
12 needs." Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006); see also McGuckin, 974 F.2d at  
13 1060. In addition, a physician need not fail to treat an inmate altogether in order to violate that  
14 inmate's Eighth Amendment rights. Ortiz v. City of Imperial, 884 F.2d 1312, 1314 (9th Cir.  
15 1989) (per curiam). A failure to competently treat a serious medical condition, even if some  
16 treatment is prescribed, may constitute deliberate indifference in a particular case. Id.

17 Plaintiff alleges that his work assignment exacerbated his medical condition, leading to his  
18 inability to report to work and his subsequent receipt of a rules violation report. It is unclear if  
19 plaintiff intends to pursue a claim based on these allegations. To the extent that he does, this  
20 claim is not asserted against any of the named defendants, and the allegations are too vague and  
21 conclusory to proceed. Also insufficient is plaintiff's allegation that his pain medication was  
22 abruptly discontinued since it is not asserted against any defendant, and the allegations are too  
23 vague and conclusory.

24 Insofar as plaintiff seeks to impose liability on the defendants' alleged failure to prescribe  
25 pain medication or to provide him with a new back brace, his brief allegations suggest, at most, a  
26 difference of opinion as to the proper course of treatment for plaintiff's ailments, which is not an  
27 actionable civil rights claim. See Toguchi v. Young, 391 F.3d 1051, 1058 (9th Cir. 2004). In  
28 addition, plaintiff does allege that Dr. Wong sought to prescribe new pain medication and a new

back brace but was thwarted by Dr. Smith. These allegations suggest that Dr. Wong was not indifferent to plaintiff's medical needs. Thus, on the facts alleged, plaintiff fails to state an Eighth Amendment claim.

#### **B. Inmate Grievance**

Plaintiff's allegations suggest that the extent of the defendants' involvement in plaintiff's care was limited to the processing of his inmate grievance. The existence of a prison grievance procedure, however, establishes a procedural right only and "does not confer any substantive right upon the inmates." Buckley v. Barlow, 997 F.2d 494, 495 (8th Cir. 1993) (citation omitted); see also Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003) (no liberty interest in processing of appeals because no entitlement to a specific grievance procedure). This means that a prison official's action in reviewing an inmate grievance cannot serve as a basis for liability under Section 1983. Buckley, 997 F.2d at 495. "Only persons who cause or participate in the violations are responsible. Ruling against a prisoner on an administrative complaint does not cause or contribute to the violation. A guard who stands and watches while another guard beats a prisoner violates the Constitution; a guard who rejects an administrative complaint about a completed act of misconduct does not." George v. Smith, 507 F.3d 605, 609-10 (7th Cir. 2007) (citations omitted). Therefore, to the extent that the basis of plaintiff's claim rests solely on the defendants' responses to plaintiff's inmate grievance, he fails to state a claim.

#### **V. Conclusion**

Plaintiff's complaint fails to state a claim on which relief may be granted. The Court will grant Plaintiff an opportunity to file an amended complaint. Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987). If plaintiff does not wish to amend, he may instead file a notice of voluntary dismissal, and the action then will be terminated by operation of law. Fed. R. Civ. P. 41(a)(1)(A)(i). Alternatively, plaintiff may forego amendment and notify the Court that he wishes to stand on his complaint. See Edwards v. Marin Park, Inc., 356 F.3d 1058, 1064-65 (9th Cir. 2004) (plaintiff may elect to forego amendment). If the last option is chosen, the undersigned will issue findings and recommendations to dismiss the complaint without leave to amend, plaintiff will have an opportunity to object, and the matter will be decided by a District Judge.

1 If plaintiff opts to amend, he must demonstrate that the alleged acts resulted in a  
 2 deprivation of his constitutional rights. Iqbal, 556 U.S. at 677-78. Plaintiff must set forth  
 3 “sufficient factual matter . . . to ‘state a claim that is plausible on its face.’” Id. at 678 (quoting  
 4 Twombly, 550 U.S. at 555 (2007)). Plaintiff should note that although he has been granted the  
 5 opportunity to amend his complaint, it is not for the purposes of adding new and unrelated claims.  
 6 George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007). Plaintiff should carefully review this  
 7 screening order and focus his efforts on curing the deficiencies set forth above.

8 Finally, plaintiff is advised that Local Rule 220 requires that an amended complaint be  
 9 complete in itself without reference to any prior pleading. As a general rule, an amended  
 10 complaint supersedes the original complaint. See Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967).  
 11 Once an amended complaint is filed, the original complaint no longer serves a function in the  
 12 case. Id. Therefore, in an amended complaint, as in an original complaint, each claim and the  
 13 involvement of each defendant must be sufficiently alleged. The amended complaint should be  
 14 clearly titled, in bold font, “First Amended Complaint,” reference the appropriate case number,  
 15 and be an original signed under penalty of perjury. Plaintiff’s amended complaint should be brief.  
 16 Fed. R. Civ. P. 8(a). Although accepted as true, the “[f]actual allegations must be [sufficient] to  
 17 raise a right to relief above the speculative level . . . .” Twombly, 550 U.S. at 555 (citations  
 18 omitted).

19 Accordingly, it is HEREBY ORDERED that:

- 20 1. Plaintiff’s request for leave to proceed in forma pauperis (ECF No. 2) is granted.
- 21 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action.
- 22 Plaintiff is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. §
- 23 1915(b)(1). All fees shall be collected and paid in accordance with this court’s order to the
- 24 Director of the California Department of Corrections and Rehabilitation filed concurrently
- 25 herewith.
- 26 3. The Clerk’s Office shall send Plaintiff a blank civil rights complaint form;
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1           4.       Within thirty days from the date of service of this order, plaintiff must file either a  
2 first amended complaint curing the deficiencies identified by the Court in this order, a notice of  
3 voluntary dismissal, or a notice of election to stand on the complaint; and

4           5.       If plaintiff fails to file a first amended complaint or notice of voluntary dismissal,  
5 the Court will recommend the action be dismissed, with prejudice, for failure to obey a court  
6 order and failure to state a claim.

7 Dated: November 12, 2020

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11 DEBORAH BARNES  
UNITED STATES MAGISTRATE JUDGE

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